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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 3, Original.

THE STATE OF KANSAS, COMPLAINANT,

vs.

THE STATE OF COLORADO ET AL., DEFENDANTS;
THE UNITED STATES OF AMERICA, INTERVENOR.

BRIEF OF THE STATE OF COLORADO IN REPLY TO BRIEF OF INTERVENOR.

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I.

Contention of United States.

In the petition of intervention the United States alleges that it now owns about a million acres of land within the watershed of the Arkansas river, and that the same are now "uninhabitable, unproductive, and unsalable, for the reason that the normal annual rainfall does not supply sufficient moisture to enable the soil to produce crops in paying quantities."

Section 3, p. 236, Record.

It is alleged that a diversion of water from the Arkansas river or its tributaries is necessary to reclaim this land, but it is admitted that a prior appropriation is "superior to any right or rights asserted or claimed by the owner or owners of riparian lands bordering on the stream." * * *

Section 5, p. 236, Record.

The petition of intervention further alleges that the doctrine of riparian rights is inapplicable to the conditions and requirements of the arid region, and the legislation of Congress and the decisions of this court and the executive acts have proceeded on the assumption that the common-law doctrine of riparian rights was abrogated, so far as the arid region is concerned; that about ten million acres of land have been reclaimed in the arid west in reliance upon the usage, custom, and law there prevailing in favor of the doctrine of priority of right as arising from priority of appropriation and beneficial use. But the petition does not at any point allege that the State of Colorado is using water in violation of any right claimed or asserted by the United States, nor does the petition allege any damage suffered by the United States by reason of the appropriation of waters for irrigation in the state of Colorado.

Section 6, p. 236, Record.

It is alleged:

> "That within the watershed of the Arkansas river, west of the ninety-ninth degree west, about 100,000 acres of land, belonging to the Government, which are now uninhabitable, unproductive and unsalable, can be reclaimed and rendered inhabitable, productive, and salable, provided reservoirs and dams are erected and constructed to catch, store, and impound

the unappropriated waters of said river, as above described, and the flood and other waters arising within its watershed; and provided such waters, when so stored and impounded, are conducted and used upon said lands for the purpose of reclaiming and irrigating the same."

Section 12, p. 238, Record.

Paragraph 14 (p. 238, Record) describes the work undertaken by the Reclamation Department, but the evidence introduced makes it clear that none of this work is being done in the watershed of the Arkansas river.

Paragraph 16 (p. 238, Record) asserts that the doctrine of riparian rights contended for by Kansas is in opposition to the doctrine which prevails in the arid regions and is antagonistic to the doctrine which the Government of the United States has sanctioned and approved and which is essential to the interests of the United States and the general welfare of the citizens thereof.

SLUG ONE (1)

The petition of intervention avers that the State of Colorado claims absolute dominion and sole ownership of the waters of interstate streams and the right of her citizens to appropriate and use all of said waters, to the damage of prior appropriations in the adjoining States through which said interstate streams flow, irrespective of whether such prior appropriators are individuals, States, or the United States, and that the same would tend to destroy the navigable capacity of the Arkansas river and other interstate streams.

Paragraph 17, p. 239, Record.

"That neither the contention of the State of Colorado nor the contention of the State of Kansas is

correct. * * * That either contention would defeat the object, intent and purpose of the reclamation act." * * *

Paragraph 18, p. 239, Record.

"That the passage of the reclamation act is the first direct and positive declaration of the Congress of the United States to undertake active operations in relation to its dominion and control over the unappropriated waters on the public domain from time to time." * * *

Paragraph 19, p. 239, Record.

"This petitioner therefore prays that it may be permitted to intervene in this case and court, and may be permitted to take proofs, examine witnesses, and be heard in argument; and also that this petitioner shall have such other and further relief in the premises as shall be found agreeable to equity and good conscience."

Petition of Intervention, paragraph 20, p. 240, Record.

It therefore appears from the petition of intervention that the United States denies the absolute dominion of the State of Colorado over the flood waters of interstate streams or the flood waters within her territory. On the other hand, it denies the doctrine of riparian rights sought to be enforced by the State of Kansas.

It does not appear from the petition or proof that the United States has any lands contiguous to the Arkansas river and the Government does not claim to be damaged.

It would therefore appear that the purpose of the United States in intervening in this suit is to provide for the future and to enable the Reclamation Service to obtain control over

the interstate streams and the flood waters within a State. The position of the Government is further set forth to the same effect and purpose at page 5 of its brief.

II.

The Extent of a State's Control of Its Own Non-Navigable Waters.

In our original brief and argument we presented at great length reasons why the bill of the State of Kansas should be dismissed. In the aspect of the case as then presented, especially in view of the *facts* developed, it seemed unnecessary to make any special discussion of the *extent* of exclusive sovereign control of its non-navigable waters possessed by the State of Colorado, and we preferred to postpone any more elaborate presentation of that subject until we should receive the brief of the intervenor, The United States. We did, however, in our original brief contend for the proposition that he who is rightfully using his own is injuring no one; that the use of the waters of the Arkansas by diversion thereof and application of the same to beneficial uses in the irrigation of the lands in the valley of the Arkansas was essential to the life and well being of the inhabitants of that valley in Colorado, and that the right of the State of Colorado to protect and preserve this necessary and legitimate use, upon which the life of its people depends, could not rightfully be taken from the State or its people by any decree.

While insisting that, upon the facts and law as developed in our original brief, Kansas has not presented a case to invoke the favorable consideration of this court, yet, in view of the contention made by the United States, as an inter-

venor, in reference to the power of a State over its non-navigable waters used for irrigation, it seems now desirable to give some further attention to that subject.

In this connection we ask the special consideration by the court of the discussion of the subject of State control of the waters of interstate streams, as presented in the brief of counsel for the defendant, The Colorado Fuel and Iron Company, filed in this cause (pp. 98-119).

In a minor degree the intervenor falls into the same error in reference to the contention of Colorado that has already been suggested as the error of the State of Kansas. The intervenor asserts that Colorado claims, by reason of its sovereignty, the right to control and *do as it sees fit* with the waters of non-navigable streams within its borders.

In considering any general principle affecting the mutual rights of men, of states, or of nations, the particular nature of the controversy and of the contentions made lie at the threshold of the discussion, and for the sake of more clearly again bringing to mind the exact nature of the contention on the part of the State of Colorado, we make a few brief quotations from our answer.

In our first defense we do allege the sovereignty of the State of Colorado within its own territory, and the fact that it is foreign to the State of Kansas for all but federal purposes, and we say:

> "That being so sovereign within its own territory, this defendant has the plenary and exclusive right and power to control and regulate the use of non-navigable waters *within its boundaries,* including non-navigable rivers and other streams, and that it has never surrendered this sovereign power over such waters, rivers and streams, nor delegated such power,

nor any portion thereof, to any other sovereignty, either national or State."

Record, p. 80.

Continuing, in the same answer and speaking of the Arkansas river, we say:

> "The use of the waters of said stream by diversion thereof, and application of the same upon the lands *in the valley* of said river *within the territorial limits of the State of Colorado,* is essential to the life and well being of the inhabitants of said valley in Colorado, and the right of continued use of the said waters is as vital to said inhabitants as is the land on which they dwell."
>
> Record, p. 80.

In the same answer we also further respectfully say:

> "That under the *rules and principles of international and interstate law,* the sovereign rights of this defendant over the water of the said Arkansas river are not servient to the sovereignty or rights of the State of Kansas, and that the said State of Kansas has no dominant estate, right, or jurisdiction as against this defendant, or its people, *in that part of the* Arkansas river *flowing in the State of Colorado,* and that the State of Colorado cannot be subjected to the burden of arresting its development, or of denying to its inhabitants the use of an element, which nature has supplied entirely within its own territory, and without which, and the free use thereof, its lands would be uninhabitable."
>
> Record, p. 80.

The reasons for the claim of sovereign control and the nature of the subject-matter to which the claim is applied

are here set forth, and in the second defense there is a still more specific statement of the contention of Colorado, in so far as it relates to the claims of Kansas. In the fourteenth paragraph of our second defense we say:

> "This defendant denies that the State of Colorado, or the corporations joined with it as defendants in this cause claim or openly assert their right or power to do as they please with all of the waters of the Arkansas river within the borders of Colorado regardless of any rights which the State of Kansas or its citizens may have therein. But this defendant, and, as this defendant is advised, the corporations associated with it as defendants herein, do claim and assert that they have the right and power to apply the water of the Arkansas river *within the borders of Colorado* to beneficial and necessary uses for the development of the country and the support of the inhabitants thereof upon those lands situated *within the valley and drainage* of the Arkansas river, returning the said waters after such use and to the extent of any surplus remaining from such use into the channel of the Arkansas river."
>
> Record, p. 88.

In the brief of the intervenor, as well as in the brief of the State of Kansas, a contention is attributed to the State of Colorado which is not justified by our answer or by our argument. As heretofore stated in our original brief, we readily concede that a State may not unnecessarily and recklessly do acts within its own borders which inflict injury upon its neighbors; but this concession is entirely consistent with our contention that under our exclusive sovereign power we may do those acts, involving the use of natural

resources within our own boundaries, which are essential to the life and prosperity of our own people.

Neither do we contend that any controversy between sovereign States of the Union may not be submitted to this court for its consideration. But we do insist that when this court comes to consider such cases it must decide in accordance with certain principles of law. If the case does not involve a matter which under our Constitution is subjected to federal control, if it does pertain to that part of a State's sovereignty which has not been surrendered to the Federal Government, then, as to any such question, this court must decide the controversy with a full recognition of those principles which should apply between independent States, applying the rules and principles of international law and protecting and maintaining sovereign rights that are recognized by international law.

So considered, the question, so far as relates to this element of sovereignty, is whether the contention of Colorado of a right to use the waters of its streams within the valleys of those streams for the purpose of irrigation of lands in the necessary development of its own resources, and for the support of its inhabitants, is sound. And is this a right which may be, under the principles of international law, taken away from the State because, as an incident to the exercise of that right, there is a diminution to some extent of the enjoyment of the waters of the same stream in a State below?

The tenth amendment to the Constitution of the United States especially provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people."

In discussing a question of State jurisdiction, this court at an early date said:

> "We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the *same undeniable* and *unlimited jurisdiction* over all persons and things, within its territorial limits, *as any foreign nation;* where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated."
>
> City of New York *v.* Miln, 11 Peters, 102, 139.

Again, this court says that "the people of each State compose a State, having its own government, and endowed with *all the functions* essential to separate and independent existence."

And in the same connection this court says:

> "To them [the States] nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved."
>
> Lane County *v.* Oregon, 7 Wallace, 71, 76.

About the same time this court again said:

> "Under the Constitution, though the powers of the States were much restricted, still, all powers not dele-

> gated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people."
>
> Texas *v.* White, 7 Wallace, 700, 725.

At a much later date this court said:

> "But the States have full power to regulate within their limits matters of internal police, including in that general designation *whatever will promote the peace, comfort, convenience and prosperity of their people.*"
>
> Escanaba Co. *v.* Chicago, 107 U. S., 678, 683.

See also:

> Manchester *v.* Massachusetts, 139 U. S., 240.
>
> Ward *v.* Race Horse, 163 U. S., 504, 513.
>
> U. S. *v.* Rio Grande Irrigation Co., 174 U. S., 690, 702-703.

The intervenor in its brief (p. 189) says:

> "But the State of Colorado does not have the status of an independent nation."

And in support of this proposition the brief cites *New Hampshire v. Louisiana et al.,* 108 U. S., 76, 90.

We do not claim, and have never claimed, that the State of Colorado has the status of an independent nation in all respects. We do claim that it has the status of an independent sovereignty, except as to those matters in which prohibitions are made by the Constitution, or as to powers which have by the State been granted to the Federal Government, and it is as to these prohibited or surrendered rights that the remarks of the court in the case cited by the

intervenor were made. The question under discussion was the right of a State to sue another State for the recovery of a private debt due to its individual citizens, in a case where the State prosecuting had no interest of its own; and a previous decision of this court was there cited to the effect that if a sovereign assumes the responsibility of presenting a claim of one of its subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suits in the courts, as of right, but by diplomatic negotiation, or, if need be, by war" (108 U. S., 90).

This would bring the proposition, then, under discussion at once within the prohibitions of the Constitution as to the powers which may be exercised by a State. The court, moreover, held in that case that provision had been made for a direct remedy by the citizen himself, and that this was equivalent to the taking away of any indirect remedy he might otherwise have claimed through the intervention of his State upon any principle of the law of nations (108 U. S., 91).

We submit that this authority can have no bearing upon the question we are now considering, as to whether, in reference to the control of its waters within its own boundaries, the State of Colorado has sovereign authority. Counsel for the intervenor do not cite any authority whatsoever to show that such sovereign authority had ever been surrendered by the State. If it has not been surrendered, then, under the authority of the Constitution, as frequently construed, this sovereign power still exists in the State. But if the State has such sovereign power, then under the principles of international law what duty does it owe to a lower State upon an interstate stream? Do such principles of law require that,

on the demand of the lower State, it shall desist from the utilization of the waters while they are within its own borders, and thereby destroy the industries and arrest the development of its own people?

It would seem as if an authority cited by the intervenor, and which is of peculiarly coercive force as against the intervenor, is sufficient to control this question, and that is the opinion of the Attorney General of the United States, rendered to the Secretary of State in the matter of the treaty of Guadalupe Hidalgo (vol. 21, Opinions of Attorneys General, p. 274). That opinion related to a question almost identical in character with the case attempted to be made by the State of Kansas in the present proceeding. It arose out of a claim presented by the Government of Mexico, through the Mexican Minister to the United States, and the character of the claim is stated as follows:

> "His statement is that the city of El Paso del Norte has existed for more than three hundred years, during almost all of which time its people have enjoyed the use of the water of the Rio Grande for the irrigation of their lands. As that city and the districts within its jurisdiction did not need more than 20 cubic meters of water per second, which was an almost infinitesimal portion of the volume of water, even in times of severest drought, they had sufficient water for their crops until about ten years ago, when a great many trenches were dug in Colorado, especially in the St. Louis valley and in New Mexico, through which the upper Rio Grande and its affluents flow, so greatly diminishing the water in the river at El Paso that, except when rains happen to be abundant, there is scarcity of water from the middle of June until March. In 1894 the river was entirely

> dry by June 15, so that no crops could be raised and even fruit trees began to wither. The result has been to reduce the price of land and cause great hardships to the people, whose numbers in Paso del Norte, Zaragoza, Tres Jacales, Guadalupe, and San Ignacio diminished from 20,000 in 1875 to one-half that number in 1894." (See p. 276.)

The Attorney General of the United States considers this claim not only from the standpoint of the treaty of Guadalupe Hidalgo, but as to the following question submitted to him, to-wit:

> "By the principles of international law, independent of any special treaty or convention, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande in the Mexican minister's note referred to, are violations of its rights which should not continue for the future and on account of which, so far as the past is concerned, Mexico should be awarded adequate indemnity?"

We ask the special attention of this court to the views of the Attorney General upon this subject, and we quote only a small portion of what he says. After discussing the relation of nations upon an international stream and of servitudes which result from the flow of such stream, the Attorney General says:

> "So it is evident that what is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.
>
> "Such a consequence of the doctrine of international servitude is not within the language used by

any writer with whose works I am familiar, and could not have been within the range of his thought without finding expression" (p. 281).

After further discussing this subject, the Attorney General says:

"No believer in the doctrine of natural servitudes has ever suggested one which would interfere with the enjoyment by a nation within its own territory of whatever was necessary to the development of its resources or the comfort of its people.

"The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain. Apart from the sum demanded by way of indemnity for the past, the claim involves not only the arrest of further settlement and development of large regions of country, but the abandonment, in great measure at least, of what has already been accomplished.

"It is well known that the clearing and settlement of a wooded country affects the flow of streams, making it not only generally less, but also subjecting it to more sudden fluctuations between greater extremes, thereby exposing inhabitants on their banks to increase of the double danger of drought and flood. The principle now asserted might lead to consequences in other cases which need only to be suggested.

* * * * * *

"It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid country through which the river, never large in the dry season, flows, giving much and receiving little" (pp. 282, 283).

The Attorney General concludes that "the rules, principles, and precedents of international law impose no liability or obligation upon the United States."

We respectfully insist that it is a rule of international law, and also of the common law within lands subject to the jurisdiction thereof, that by natural position those along the upper reaches of a stream have the dominant estate, and those on the lower reaches of the stream the servient estate as to its waters.

This subject is to some extent discussed in the opinion of the Attorney General, from which we have just quoted, and it is well settled, as we think, that the sovereignty within whose jurisdiction a stream rises has jurisdiction of that stream to the point where it leaves its territory:

> "Where the entire upper portion of a navigable river is included within a single State, the part so enclosed is undoubtedly the property of such State."
> Halleck International Law, 138, sec. 23.

If this is true as to a navigable river, *a fortiori* is it true of a non-navigable stream.

The subject under consideration involves the right of a State to self-preservation. The situation of Colorado as to the waters of the River Arkansas, as set forth in the evidence and as discussed at length in our original brief, clearly show that the question is one of this magnitude; and it is a fundamental principle, and constantly recognized by the writers on international law, that this right of self-preservation is an absolute right of a State.

> "Another right immediately resulting from the independence of sovereign States, is that of *self-preservation*. This is one of the most essential and im-

portant rights incident to State sovereignty, and lies at the foundation of all the rest. It is not only a *right* with respect to other States, but a *duty* with respect to its own members, and one of the most solemn and important duties which it owes to them. 'The right of self-preservation,' says Phillimore, 'is the first law of nations, as it is of individuals.' "

Halleck International Law, 91, sec. 18.

The defendant, State of Colorado, is before this court in the present proceeding in a defensive attitude. A claim is made by the State of Kansas, and by the United States, that the State of Colorado should subject its policy in this matter, so essential to the welfare of its people, to the control of outside agencies. Before either the State of Kansas or the intervenor, The United States, can in this forum sustain their contention, they must assume the burden of showing that by some principle of law which should control the action of this court they are entitled to the relief for which they contend, as against not some imaginary action which might be taken by the State of Colorado, but as against the action which the evidence shows the State of Colorado is taking and is likely to take in reference to the subject-matter under consideration.

We respectfully insist that nothing has been shown by either the State of Kansas or by the intervenor which would justify this court in taking from the State of Colorado its right of sovereign control over waters which originate in its territory, so long as that control is exercised only upon the waters while they are in Colorado and for purposes which are essential to the life and well being of the people of Colorado.

Sovereign powers to the extent above claimed became

vested in the State of Colorado on its admission to the Union of States in 1876. Immediately upon its admission, in the performance of its duties to its people, it commenced the exercise of these sovereign powers in the regulation and control of non-navigable waters within its boundaries. This was done with the knowledge and acquiescence of its sister States, and of the United States.

This State control of waters has been in effect conceded by the United States through a series of acts relating to the disposition and improvement of the public domain.

III.

Congress, by a Series of Legislative Enactments, Has Sanctioned the Diversion of Water and the Reclamation of the Arid Lands, Irrespective of Lands Retained by the General Government.

In the case of *United States v. Rio Grande Irrigation Company,* 174 U. S., 690, 703, this court said:

> "In the absence of specific authority from Congress, a State cannot by its legislation, destroy the right of the United States as the owner of lands bordering on a stream to the continued flow of its waters so far at least as it may be necessary for the beneficial uses of the Government property."

In the case under our immediate consideration it does not appear from the pleadings or the evidence that the United States owns any land bordering on the Arkansas river. On the contrary.

Moreover, beginning with the act of 1866, the United States has passed numerous statutes justifying, approving,

and upholding the appropriators of waters from streams in the arid West without regard to the effect such action might have upon the public domain retained by the United States. Such legislation was had without qualification, and the only implied exception that can be made to it is the reserved power in the United States to control all streams and waters that might have an appreciable effect upon navigation. Subject to this one condition, the legislation mentioned gave unqualified approval to the diversion of water for irrigation, regardless of the common-law doctrine of riparian rights.

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."
>
> Rev. Stats., sec. 2339; sec. 9, A. C. July 26, 1866.

> "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."
>
> Rev. Stats., sec. 2340, sec. 17, A. C. July 9, 1870.

The other acts of Congress chiefly concern the construction of irrigation reservoirs, setting aside lands therefor, and appropriating money. They are not directly aimed at the general law of waters. They recognize that the law of appropriation applies in the arid regions, but do not mention the rights of riparian proprietors. They usually contain saving clauses protecting all vested rights. A list of these statutes follows:

19 Stats., 377; 1 Supp. Rev. Stats., 137; enacted March 3, 1877; amended 1891; concerning specified lands and recognizing the law of appropriation as there in force "subject to existing rights;" the first of the arid or desert land acts.

25 Stats., 505, par. 4; 1 Supp. Rev. Stats., 626 (1888).

25 Stats., 939, par. 4; 1 Supp. Rev. Stats., 698 (1889).

26 Stats., 371, par. 4; 1 Supp. Rev. Stats., 791, 792 (1891).

26 Stats., 1095; 1 Supp. Rev. Stats., 942, 946 (1891); canal companies given right of way subject to liability for injury to settlers.

28 Stats., 372-427; 2 Supp. Rev. States., 259 (1894); amended June 11, 1896 (29 Stats., 434; 2 Supp. Rev. Stats., 525); known as "the Carey act."

29 Stats., 599; 2 Supp. Rev. Stats., 563 (1897).

The act approved March 26, 1866, announced the doctrine of priority of appropriations in the arid regions and decreed that the rights vested under this doctrine shall be protected.

In 1891 Congress passed an act providing for the confirma-

tion of a right of way for all ditches which crossed the public domain and subjecting the public domain to selections for reservoir sites, whether the water was used on the public domain or not.

The eighteenth section of this act specifically declared:

> "The privileges herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States and Territories."

The Supreme Court of Wyoming says:

> "In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however this may be, we entertain no doubt of the power of the people, in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the State. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the General Government was primarily requisite to the inception of the rule, of prior appropriation, that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877. Those acts have been too often quoted and are too well understood, to require a restatement at this time, at the expense of unduly extending this opinion. It has been held that the act of July 26, 1866, was rather a voluntary

recognition by Congress of pre-existing rights, constituting valid claims to a continued use, than the establishment of new rights (Broder *v.* Water Co., 101 U. S., 274; 25 L. Ed., 790). By these various acts 'the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention of the common law, which permitted the appropriation of these waters for legitimate industries,' and 'a State may change the common-law rule, and permit the appropriation of the flowing water for such purposes as it deems best' (U. S. *v.* Rio Grande Dam Irrigation Co., 174 U. S., 690; 19 Supp. St., 770; 43 L. Ed., 1136). If, as has been said, the title of the General Government to the public lands is that of proprietor, rather than sovereign (Kin. Irr., sec. 145), it would seem that its rights to such are not greater to the waters of the streams flowing across the lands than those of an individual owner."

Farm Investment Co. *v.* Carpenter, 61 Pac., 258, 264-265.

If the United States retains governmental power over the public domain after the admission of a Territory as a State, the conclusion inevitably follows that a dual system of government exists within the boundaries of the State.

The Desert Land Act.

The act of March 3, 1877, commonly called the desert-land act, is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has

filed his declaration to become such,' and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land is surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided* that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irri-

gation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

"SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The above act was amended on March 3, 1891, so as to include the public lands of the State of Colorado (26 Stats., 1096).

It will be observed that this act requires the land to be as compact in form as possible, and that such lands cannot be over a mile and a quarter in length. It will thus be seen that the diversion of water to a distance of at least a mile is expressly authorized, while the fact that there is no restriction in the act itself may be construed to allow the diversion of water to any distance, provided that it does not interfere with the navigation of any river.

It is not admitted that legislation on the part of the Government is necessary to authorize the diversion of water, but we do claim that the legislation of Congress impliedly prohibits the Federal Government from setting up any claim to the waters diverted from any of the interstate streams for the purpose of reclaiming arid lands. We believe this

construction is fully justified by the opinion of this Court in numerous cases.

Gutierres *v.* Albuquerque Land Co., 188 U. S., 545, 553.
U. S. *v.* Rio Grande Irr. Co., 174 U. S., 690.
Atchison *v.* Peterson, 20 Wall., 507.
Basey *v.* Gallagher, 20 Wall., 670.
Jennison *v.* Kirk, 98 U. S., 274.
Broder *v.* Natoma Water Co., 101 U. S., 274.
Clark *v.* Nash, 198 U. S., 361.

In the case of Broder *v.* Natoma Water Co., *supra,* the court said:

> "It is the established custom of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the Government had by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison v. Peterson,* 20 Wall., 507; *Basey v. Gallagher, id.,* 670; *Forbes v. Gracey,* 94 U. S., 762; *Jennison v. Kirk,* 98 *id.,* 453."

The Carey Act.

The Carey act, passed August 18, 1904, is found in Appendix A of the Government brief. This act provides, among other things, that "the State shall file a map of said lands proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation."

The State is authorized to enter into contracts for the reclamation of land, but the State is not authorized to dispose of the same in any way except to secure reclamation, cultivation, and settlement, and as fast as the State furnishes satisfactory proof that the lands are reclaimed, patents for such lands shall issue to the State or its assigns. Any surplus of money realized from the sale of lands under this act must be devoted to the reclamation of other desert lands in the same State.

Under this act, with the approval of the Secretary of the Interior, a large tract of land in the State of Wyoming and another large tract in the northwestern part of Colorado have been segregated from the public domain and its reclamation undertaken. The maps filed show that the land extends large distances from the river. However, there appears to be no contention as between the State of Colorado and the Government as to the distance water may be diverted from a flowing stream.

The Reclamation Act.

The reclamation act is found in Appendix B of the Government brief. Section 8 of this act is especially pertinent to the contention of the Government. Congress here expressly puts itself on record that the diversion of water for irrigation under the reclamation act shall be subject to the local laws of the State in which the appropriation is made. We quote section 8, as follows:

> "That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder; and the Secretary of the Interior in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right."

So far as the Government is concerned, Congress has specifically authorized the diversion of water for the purpose of reclaiming arid lands and making the same productive.

All the lands now being farmed in Colorado have been acquired from the Government. It is the policy of the Government to sell the public lands to *bona fide* settlers. The laws applicable to Government land in the arid region pro-

vide for its acquisition for agricultural purposes, and if it is taken up by settlers for this purpose, it is to be presumed that the Government recognizes the right of the applicant to divert water in order to render it available for farming purposes. This presumption would exist without any legislation whatever, because it must be taken for granted that the Government knows that the land cannot be used for agricultural purposes in the arid States or Territories without irrigation. When, however, we consider the legislation passed by Congress expressly authorizing and sanctioning the construction of ditches and reservoirs, it must be conclusively presumed that the Government is now estopped from denying the right to appropriate water upon the public domain. And this right of settlers today and tomorrow and each succeeding day is as great as the right of those who took up lands in years gone by, because legislation is still in force and effect and lands continue to be sold in pursuance of all the legislation which now exists on the statute books.

Where is the line to be drawn between settlers who shall be denied this right on account of ownership of land still retained by the Government? The answer undoubtedly is, that so long as these various statutes remain unrepealed and the Government is selling land under the guaranty offered by it, the settler possesses the right to divert water without interference by the Federal Government.

It is said that the Government has one hundred thousand acres of land within the water shed of the Arkansas river capable of being reclaimed, and therefore it has a right to come into this suit and demand relief. How much of this land must be sold by the Government before the statutes

cited become operative? The reclamation act passed by Congress was never intended to prevent citizens of any State from taking up desirable land and reclaiming it. Its evident purpose was to undertake what individuals could not accomplish.

Again, the allegation is made that the impounding of water by the Government is necessary in order to sell certain portions of the public domain capable of being irrigated. We presume these allegations mean that the Government is interested in the decree to be entered; in protecting the right to further divert waters for irrigation.

Now, this proposition is true, that all the lands settled upon in Colorado have been acquired from the Federal Government, and every argument that can be urged in favor of impounding waters in order to insure future sales is just as binding and convincing with reference to lands already sold. The Government has no right to prevent the purchasers of lands already acquired from enjoying the highest benefit and utility capable of being attained by reason of irrigation. We have a right to maintain and argue that the lands were acquired under the assurance and guaranty that the United States would not interfere with their being reclaimed.

We call the attention of the court to the discussion of "Federal Control of the Water of Interstate Streams," as set forth in the brief of counsel for the defendant, Colorado Fuel and Iron Company, pages 80-98.

IV.

If It Be True That the Right to Irrigate Arid Lands Existed Prior to and Independent of Any Legislation, Then the United States Must Have Made All Sales of Lands Subject to This Right.

This court, speaking through Mr. Justice Miller, has said:

> "We are of the opinion that the section of the act (act of 1866) which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use than the establishment of a new one. This subject has so recently received our attention and the grounds on which this construction rests are so well set forth in the following cases that they will be relied on without further argument: Atchison *v.* Peters, 20 Wall., 507; Basey *v.* Gallagher, *id.*, 670; Forbes *v.* Gracey, 94 U. S., 762; Jennison *v.* Kirk, 98 U. S., 453."
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> Broder *v.* Water Co., 101 U. S., 274, 276.

Evidently the law of necessity is the source from which sprang this independent right to use the waters of streams for irrigation, independent of statute. The common law does not have application to conditions and exigencies to which it is not suitable. A large portion of the world is known as "arid region" and is not capable of producing crops and maintaining a population unless resort is had to irrigation in its amplest form. In the adoption of common law it is expressly provided that it shall be applied only under conditions and circumstances to which it is appropriate. Evidently all the sales of land made by the United States heretofore and hereafter must be made in recognition of this

superior right to use the water of interstate streams for irrigation. A contrary doctrine would render said lands undesirable and unsalable. The rights of persons who have already purchased Government lands must be considered as well as the alleged right of the Government to take control of waters for the purpose of irrigating unsold lands.

To quote Mr. Justice Barnes, of the Supreme Court of Arizona:

> "The right to appropriate and use water for irrigation has been recognized longer than history. Evidences of it are to be found all over Arizona and in New Mexico in the ancient canals of a prehistoric people who composed a dense and highly civilized population. * * * Many of these ancient canals have been used for modern husbandry."
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> Clough *v.* Wing, 2 Ariz., 371, 380.

In fact, as Mr. Follett admits (Senate Doc. No. 229, p. 54), the Pueblo Indians are the oldest inhabitants of the Rio Grande drainage, whereas the El Paso irrigation canal dates from 1888 (Senate Doc. No. 229, p. 94), and the Spanish settlement of Paso del Norte, on the Mexican side of the river, was founded long after Coronado and his immediate successors had established permanent colonies on the Rio Grande and certain of its tributaries in New Mexico.

Mr. Elwood Mead, Government expert in charge of irrigation investigations, writing of irrigation in New Mexico, says:

> "In the first half of the sixteenth century Spanish explorers * * * found Pueblo Indians irrigating, * * * as their forefathers had done for centuries before them and as their descendants are still doing today. In this valley and along the trib-

> utary streams * * * Spanish settlements sprung up and maintained themselves by means of these life-giving waters. The ditches of Las Cruces, N. Mex. (in the Mesilla valley, just above El Paso), have an unbroken record of three hundred years of service, the history of which is written in the banks of the canals and the fields irrigated."
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> Yearbook of the Department of Agriculture, 1899, p. 591.

The two last extracts are taken from Senate Document No. 154, 2d session, entitled "A message from the President of the United States transmitting a report from the Secretary of State, with accompanying papers, in regard to the equitable distribution of the waters of the Rio Grande."

With the greater portion of intervenor's brief we do not take issue. It coincides with the views already expressed by the State of Colorado.

V.

Under the Issues in This Cause, What Consideration Should Be Given to Prior Appropriations in the Lower State as Compared with Later Appropriations in the Upper State on an Interstate Stream?

The intervenor asks this court to announce a doctrine to the effect that he who is prior in time in the actual appropriation of the water, and continues to apply the same, is prior in right, *irrespective of State lines* and irrespective of ownership, riparian or otherwise, if within the watershed of the streams from which the water is taken.

Intervenor's Brief, p. 202.

We respectfully submit that the question as to relative rights of *appropriators* of the waters of an interstate stream affecting lands in different State jurisdictions is not now before this court. It is not brought into this case by the State of Kansas by its bill, for in that bill any right based on priority of appropriation is distinctly repudiated. If we should ignore the defect in the bill and look to the evidence as to the Garden City ditches, we shall find that even then there is no situation of fact which invokes a decision by this court. See our discussion as to Kansas ditches (Colorado Brief, pp. 198 to 214).

The intervenor does not show any present interest in the question. While it alleges that the Government owns a million acres of land in the watershed of the Arkansas west of the 99th degree of longitude, "which are now uninhabitable, unproductive, and unsalable, for the reason that the normal annual rainfall does not supply sufficient moisture to enable the soil to produce crops in paying quantities" (Rec., p. 236), yet the petition of intervention also shows that its claims are limited to the amount of the present *unappropriated* water of the Arkansas river (Rec., p. 240). The petition does not show that the United States has appropriated any water from the Arkansas river, of any date or priority, for any purpose of irrigation, but, on the contrary, expressly states, as to action under the reclamation act, "That while no definite action has as yet been determined upon with reference to the application of the terms and conditions of said act to the Arkansas river, it *may be deemed desirable* for the proper authorities of the United States, acting under the Secretary of the Interior, to commence operations upon said river at any time" (Rec., p. 240).

We respectfully submit that, even in a controversy between States, this court does not sit to try moot questions, and that its power is limited to the decision of existing substantial controversies as to facts now in being.

It may well be that in a controversy between individual appropriators on opposite sides of a State line, but on the same stream, the question of relative right may properly be the subject of judicial cognizance and decision, but in any such case all the facts and circumstances which go to control the extent and character of the rights asserted must be presented before a sound decision can be made.

A serious obstacle to the laying down of any general rule upon this subject in advance of a specific case for decision arises from the very nature of questions relating to the distribution of water for purposes of irrigation. While in Colorado and other arid States priority of appropriation is recognized as the basis of right, yet in the practical determination of relative rights many other considerations are or may be involved, as, for example, the question as to whether the prior appropriation can physically be satisfied without a reckless waste, which would be injurious to other rights. This particular phase of the matter can be illustrated by facts developed in this record. About the time the Garden City ditches were first constructed, the waters of the Arkansas, following a natural habit which had characterized the river for more than a century, were wont to sink in the sands of the bed of the river near the eastern boundary of Colorado, and did not flow to the inlets of such Garden City ditches at any time of low water. Now, under such conditions, even though all junior appropriations on the upper reaches of the stream should be shut down, to the great detriment of the

appropriators, so that the water could flow down the stream with a view of reaching the Garden City ditches, such action would be unavailing by reason of the loss of the water in the sands of the stream before it reached the intended destination.

This situation has, indeed, now been changed, by reason of facts which we have fully set forth in our original brief. Irrigation in Colorado, after being some time in operation, has had the effect of extending further eastward the perennial flow of the stream, so that these waters now reach the headgates of the Garden City ditches, although the water would not have done so if the river had remained in its normal condition, unaffected by Colorado irrigation.

The distribution of water for purposes of irrigation, affecting, in a valley such as that of the Arkansas, a vast number of individuals and many thousands of acres of land, requires an elaborate machinery of distribution and cannot otherwise be equitably or effectually carried on. The creation and control of this machinery of distribution is not within the dominion of the Federal Government, and, unless our Constitution should be amended, it cannot be placed under the power of the Federal Government, as it does not relate to any subject committed by the Constitution to Congress.

The jurisdiction over this machinery of distribution is necessarily confined to the jurisdiction of a given State. Colorado cannot control the necessary machinery of distribution in Kansas. Kansas cannot control like machinery in Colorado. Under our Constitution, the States themselves have no power to agree upon joint commissions, or any form of joint machinery, to be operated in the interest of the people of both States, without, at least, the consent of Con-

gress, which has not yet been given. It may be that such joint arrangement between the States, made with the consent of Congress, would be desirable. However desirable it may be, it does not exist, and therefore, at the present time, such possibility of future legislative action cannot be considered in any decision made by this court of the controversy now before it.

In view of these conditions affecting the subject of interstate control of waters used for purposes of irrigation, we respectfully submit that the case at bar does not justify or permit the announcement of any rule upon this subject of relative rights of appropriation on the opposite sides of the State line, and that that question must either await further legislative action or constitutional amendment, as hereinabove suggested, or be left for decision in a specific case involving individual rights under the particular conditions and circumstances which may at the time be presented to the court for decision.

Respectfully submitted,

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